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ABSTRACT

From 1969 to 1993 the definition of program length commercials has not been consistent. The FCC's first involvement with program length commercials was in 1969 when "Hot Wheels," a cartoon based on Mattel Corporation's Hot Wheels cars, was alleged to be nothing more than a 30 minute commercial. The FCC made no formal ruling but did develop a vague definition of a program length commercial. In 1971, the FCC issued its first Notice of Inquiry and Notice of Proposed Rule Making regarding commercial content in children's programming. Response was tremendous, and the FCC concluded that broadcasters have a special obligation to serve the unique needs of children. No formal rulings were made by the FCC, who wanted the broadcast industry to regulate itself. A 1978 Notice of Inquiry only restated previous guidelines. In 1983, the FCC wanted to deregulate children's television, while Congress started a major effort to adopt legislation. The "Children's Television Education Act of 1983" was the first action taken by Congress. The ban on program length commercials was officially removed in 1984 and coincided with an increased number of program length commercials. With the passage of the "Children's Television Education Act of 1990" Congress attempted to force the Federal Communications Commission (FCC) to clarify their regulatory position. Less than 2 years after passage of the "Children's Television Act of 1990," the FCC is disregarding the definitions that it established. (One hundred sixty-four notes are included; 146 references are attached.) (RS)

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FROM HOT WHEELS TO TEENAGE MUTANT NINJA TURTLES: THE EVOLUTION OF THE DEFINITION OF PROGRAM LENGTH COMMERCIALS ON CHILDREN'S TELEVISION

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In 1960 the Federal Communications Commission added children's programming to a list of fourteen areas that broadcasters must address in order to serve the public interest, convenience and necessity.[1] Since that time, however, the FCC has vacillated over the extent or even the necessity of regulation in this area. One aspect of children's television that has raised concern and debate is the prevalence of program length commercials. The Federal Radio Commission in 1928 warned that advertising, while a vital aspect in supplying programming, must not harm the benefit that the public derives from broadcasting.[2] It is for this reason that Congress gave the FCC statutory authority to prevent excessive or abusive advertising practices. Both the FCC and the Federal Trade Commission have dealt with program length commercials for children, but neither developed a consistent policy of what constitutes such an advertisement, often raising their eyebrows instead of taking per se action. From 1969 to the present the definition of program length commercials has not been consistent, but with the passage of the Children's Television Act of 1990 Congress has attempted to force the FCC to clarify their regulatory position in this area. The FCC, instead of using the Congressional mandate to strengthen its policy, has adopted a very strict definition of what amounts to a program length commercial directed at children, which has led to new concerns about the proliferation of toy-based programming and its impact on children.

It is somewhat ironic that the FCC's first involvement with program length commercials was the result of an action brought by one toy manufacturer against another. In 1969 Topper Corporation filed a complaint with the FCC concerning the American Broadcasting Corporation's airing of a Saturday morning cartoon based on Mattel Corporation's Hot Wheels cars. Topper alleged that the show, Hot Wheels, which revolved around the exploits of a groups of teenagers who form a racing club, was nothing more than a thirty minute

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[1] "Report and Policy Statement re: Commission en Banc Programming Inquiry," 20 R.R. 1901, FCC 60-970 (1960).

[2] "Children's Television Report and Policy Statement," 50 F.C.C. 2d. 1, 9 (1974).

commercial for the Hot Wheels' products.[3]

Hot Wheels was produced by Ken Snyder Productions who used Mattel's advertising agency, Carson Roberts, Inc., to help secure the sale of the program to ABC.[4] As Carson Roberts Vice-President Eddie Smarden described, "I was acutely aware of the biggest fad among young boys, to sweep the country: Auto racing! Both Fred and I concluded that the name of the show should be Hot Wheels, to take advantage of the enormous value of the fad then very much in vogue."[5]

ABC did prevent Mattel from advertising its Hot Wheels cars during the program or from modeling cars based on any of the toys, and identified Mattel as the sponsor of the program.[6] Mattel, in turn, purchased advertising time during a number of other Saturday shows and three minutes within the Hot Wheels program to advertise their other products.[7] By 1970, however, Mattel's catalogue included toys designed after the ones in the show and advertised them as "from the Hot Wheels TV show."[8] This violated the agreement with both ABC and the National Association of Broadcasters, which prohibits cross references between commercials and programs.[9]

Topper viewed this arrangement as deleterious to children. "A child who has been saturated with "Hot Wheels" commercials on a regular basis, and who in fact associates the name "Hot Wheels" and racing cars with Mattel, has that association continually reinforced during the "Hot Wheels" programs which . .

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[3]"In Re Complaint of Topper Corporation Concerning American Broadcasting Co. and Mattel, Inc.," 21 F.C.C. 2d 148 (1969).

[4]Id.

[5]"In the Matter of American Broadcasting Companies, Inc. Concerning Logging of Hot Wheels Programs," 23 F.C.C. 2d. 132 (1970).

[6]"Logging of Hot Wheels" p. 132.

[7]Id.

[8]"Logging of HOt Wheels" p. 132.

[9]Id. at p. 133.

. amounts to a thirty minute commercial for Mattel's "Hot Wheels" products."[10]

The FCC agreed with Topper's claim that Mattel was receiving promotional time beyond that which was logged by ABC, and that the program was developed with both an economic and entertainment incentive. As the FCC said, "We find this pattern disturbing; more disturbing than the question of whether the commercial time logged is adequate. For this pattern subordinates programing in the interest of the public to programing in the interest of its salability."[11] In spite of their concern, and an ongoing investigation by the FTC into violations of fair methods of competition, the FCC did not make a formal ruling in the matter. Instead they gave ABC seven days to come up with alternatives to resolve the problem.[12] ABC did not comply and the FCC, over the objection of the NAB, decided on February 11, 1970 to investigate alternative methods of logging the additional commercial time.[13]

Based on these and subsequent hearings by the FCC, the Commission developed a definition of a program length commercial. Accordingly, program length commercials, ". . . interweave program content so closely with the commercial message that the entire program must be considered commercial."[14] Such programs are ones where salability takes precedence over programming in the public interest, where sales is the dominant interest of the program, and thus airing these shows is a dereliction in a licensee's duty and a violation of logging the proper amount of commercial material broadcast within an hour.[15]

The vagueness of this definition prompted further petitions to the FCC, this time by National Citizens Committee for Broadcasting (NCCB), which

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[10]Topper Communications, p. 148.

[11]Id. at p. 149.

[12]Id.

[13]"Logging of Hot Wheels" p. 133.

[14]"In the Matter of Program Length Commercials," 39 F.C.C. 2d 1062 (1973).

[15]Id. at p. 1063.

prompted a clarification of the Commission's position. According to the FCC,

> "The fact that an interested commercial entity sponsors a program, the content of which is related to the sponsor's products or services does not, in and of itself, make a program entirely commercial. The situation which causes the Commission concern is where a licensee quite clearly broadcasts program matter which is designed primarily to promote the sale of a sponsor's product or services, rather than to serve the public by either entertaining or informing it. The primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to, the sponsor's advertising . . . to the point that the entire program constitutes a single commercial promotion for the sponsor's program or services."[16]

This test would be applied strictly. While this clarification dealt with program length commercials, the Commission did not address the issue of children's television at this time. What is apparent is that the FCC has numerous exceptions to its definition based each different situation.

It was not until January 26, 1971 that the FCC issued its first Notice of Inquiry and Notice of Proposed Rule Making in the area of commercial content in children's programming, in response to a petition filed by Action For Children's Television (ACT).[17] While most of the petition dealt with ACT's desire to establish quotas for different age groups, it also asked for no sponsorship and no commercials on children's programs, and the banning of host selling.[18] While the FCC received over 2000 letters in support of ACT's proposals, there were 23 that raised a number of objections.[19] These concerns were raised repeatedly over the next twenty years.

The primary objection was that the proposals violated the First Amendment and Section 326 of the Communications Act of 1934. The second objection was that the policy ideas were contrary to the FCC's policy to let

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[16]"In Re Public Notice Concerning the Applicability of Commission Policies on Program Length Commercials," 44 F.C.C. 2d. 985, 986 (1974).

[17]"In the Matter of Petition of Action For Children's Television for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14 Hour Quota of Children's Television Programs," 28 F.C.C. 2d. 368 (1971).

[18]Id.

[19]Id. at p. 369.

licensees make programming decisions in the public interest. Third, children's television is too hard to define and categorize. Finally, prohibiting commercials would remove the major financing for children's programs, thus being a self-defeating concept.[20] Opponents also believed that the NAB Code was sufficient regulation.[21]

The FCC recognized the importance of these objections, but also noted the necessity of protecting the nation's children. "The importance of this portion of the audience, and the character of material reaching it, are particularly great because its ideas and concepts are largely not yet crystallized and are therefore open to suggestion, and also because its members do not yet have the experience and judgement always to distinguish the real from the fanciful."[22] It was for this reason that the FCC requested data to determine the public interest in this area and what benefits television has beyond holding a child's attention. What is lacking in the inquiry is any proposals for rulemaking. As Commissioner Nicholas Johnson expressed in his concurring opinion, "It is Kafkaesque that, after ten months, after 15 volumes of comments, this Commission has to tell concerned parents that '. . . we . . . have reached no conclusion, tentative or final, on the desirability of a rule. . . . and children will be barraged with potentially harmful propaganda for the next months and even years."[23]

Response to the NOI and NOPRM was tremendous. In addition to 100,000 letters from citizens, the FCC conducted panel discussions in October of 1972 and oral arguments in January of 1973.[24] Based on the new data the FCC concluded that broadcasters have a special obligation to serve the unique

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[20] Id. at p. 369.

[21] Id.

[22] Id. at p. 370.

[23] Id. at p. 373.

[24] "Children's Television Report and Policy Statement," 50 F.C.C. 2d. 1, 2 (1974).

needs of children.[25] Such concerns were expressed in both the Surgeon General's Report of 1974 and an FTC report in 1977. According to the FTC, young children do not understand the profit-making aspect of commercials, trust and believe all ads, remember only concrete and simple aspects of the ads, have trouble differentiating between program and commercial, and want to purchase those items seen on television.[26] The FCC's 1974 ruling became the standard for children's programming for ten years, although the FCC relied heavily on the NAB code instead of adopting per se regulation in the areas of limiting commercial time.[27]

Section 317 of the Communications Act states that all advertisements must indicate that they are paid for and by whom, or else an advertiser would have an unfair advantage if the paid nature of the commercials could not be taken into account.[28] Clear separation between programs and commercials bears directly on program length commercials, because children have an inherently difficult time distinguishing between program and commercials, especially if the whole program is an advertisement.[29] For this reason the FCC banned the use of "host-selling," which was seen as violating the trust of children by serving the financial interest of the station.[30] This violation of trust, as explained in a footnote, resulted from having a distinguished character or personality from a children's program sell products on their own program or on other programs. While the FCC did not prohibit other practices, they warned broadcasters of the potential deleterious effects of including advertisements

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[25] Id. at p. 5.

[26] In "Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children," 54(56) New York university Law Review 561, 582 (1979).

[27] Id. at p. 12-13.

[28] Id. p. 15.

[29] "Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children," 54(56) New York University Law Review 561 (1979).

[30] Id. at p. 16-17.

for products within a show, a practice known as tie-ins, which could indicate that the show was a program length commercial.[31] The FCC concluded, "Any material which constitutes advertising should be confined to identifiable commercial segments which are set off in some clear manner from the entertainment portion of the program."[32] Stations had until January 1, 1976 to comply with the new orders, although the docket was left open to allow the FCC to revisit the issues.[33]

No formal rulings were made by the FCC, who wanted to see if the NAB would be an effective tool of self-regulation.[34] This decision to use self-regulation was upheld by the Court of Appeals in Actions for Children's Television v. FCC.[35] The Court also indicated the Commission's authority to institute policy guidelines or specific regulations in the area of children's programming, and warned that the FCC has a responsibility to act in this area, which they deemed important, if additional evidence warrants.[36]

Two years after broadcasters were supposed to be in compliance with the children's television policies, the FCC began a second Notice of Inquiry into the effectiveness of and possible alternative to the 1974 rulings.[37] The NOI provided a definition of children's programming to be shows designed for an audience of twelve and under.[38] Beyond establishing this definition the 1978 NOI did little more than restate the FCC's previous guidelines, concerns and

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[31] Id., in footnote 20, at p. 17.

[32] Id. at p. 18.

[33] Id.

[34] "Children's Programing and Advertising Practices," 43(162) Federal Register 37136, 37137 (August 21, 1978).

[35] 564 F. 2d 458 (D.C. Cir. 1977).

[36] Id. at p. 37137-37138.

[37] "Children's Programming and Advertising Practices," 43(162) Federal Register 37136 (August 21, 1978).

[38] Id. at p. 37137.

questions in a request for more data.[39] The FCC, however, did reestablish the Children's Television Task Force to evaluate the effectiveness of self-regulation.[40]

On October 30, 1979 the Task Force reported to the Commission that broadcasters were not complying with the programming guidelines of the 1974 Policy Statement, but had followed the advertising guidelines. Therefore, the FCC did not alter these guidelines, and stopped active consideration of the commercial issues. The 1980 NOPRM was confined to addressing programming concerns. In separate statements Commissioners Joseph R. Fogarty and Tyrone Brown expressed concern over the FCC's overall inaction since the beginning of their investigations into children's programming in 1971.[41]

Although the Commission had relied on self-regulation to affect its policies in both children's programming and advertising, up till this point, they had illuded to the potential for formal regulations. This favorable attitude toward broadcast regulation, not just in the arena of children's programming, changed under the deregulation emphasis of Ronald Reagan's presidency. In 1983, just before Christmas, the FCC began an inquiry into altering their regulatory stances on television programming, commercialization, ascertainment, and program logging in an effort to increase diversity in the video marketplace, similar to actions taken to deregulate radio in 1981.[42]

The Commission based their decision to deregulate commercial television on the changing nature of the video marketplace, which indicated to the FCC that the public interest would best be served by competitive not regulatory

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[39] Id. at p. 37142.

[40] "Children's Television Programming and Advertising Practices," 45(6) Federal Register 1976 (1980).

[41] Id. at p. 1965.

[42] "In the Matter of the Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations," 94 F.C.C. 2d. 678, 678-679 (1983).

forces.[43] The FCC expressed that not only were regulations costly, competitively disadvantageous, stifling of experimentation and innovation, but that programming and commercial guidelines, even though they had no substantive effect, impinged on editorial control.[44]

The marketplace had changed since the 1970s, especially in the area of children. Up until the early 1980s children were not seen as a market unto themselves. Advertisers were still after the parents and therefore, there was not as much effort placed on programs that attracted an all child audience.[45] As family life began to move toward working parents children began to have more say in the purchases of the family, and not just about items that were specifically designed for children.[46] This new market began to show itself in the mid-1980s. Not only were cable, video games and video stores providing additional outlets for children's entertainment, but advertisers were beginning to realize the growing importance of the young consumer as a target for advertisements[47], and according to the FCC, it is not a "sin" or a "crime" to influence a child's consumptive nature, as long as it is not explotive.[48] Therefore, removing or restricting sponsorship of children's programming would only serve to lessen the amount of shows designed for young audiences.[49]

Regulation of children's programming, however, had taken on a substantive nature in the minds' of broadcasters.[50] Thus, the Commission

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[43] Id. at p. 680.

[44] "Commercial TV Stations" 1983 p. 695.

[45] "Federal Communications Commission: Children's Television Programming and Advertising Practices," (1980).

[46] Horst H. Stipp, "Children As Consumers," 10 American Demographics 27 (February 1988).

[47] Joanne Lipman, "Sponsors Put Money on Kiddie TV Shows," The Wall Street Journal B4 (July 23, 1990).

[48] 50 FCC 2d (1974), p. 39.

[49] Id. at p. 11.

[50] Id. at p. 696.

singled out this area of programming in its 1983 discussion. The FCC argued for deregulation in this area, because the Task Force's study indicated that broadcasters were conforming to the commercial time limits of the NAB code.[51] What is not mentioned, however, is if the Task Force took into account program length commercials in their study, which would have altered their results.

The FCC also argued that, ". . . the ever-decreasing number of commercial-related complaints lodged by television consumers reflects less viewer dissatisfaction with the commercial practices of television licensees."[52] No where does the 1983 policy statement discuss how much of a decrease there was or why this reasoning became a large part of the FCC's justification for deregulation.

While the Republican led FCC was looking into deregulation of children's television, the Democratic Congress was starting a major effort to adopt legislation in this area. Representative Timothy E. Wirth led the first charge in October 1983 when he proposed the Children's Television Education Act. This Act only dealt with increasing the amount of programming aimed at children, not a ban on program length commercials.[53] Wirth was angered over statistics that broadcasters aired only four-and-a-half hours per week of children's fare. He was also upset that the NAB apparently encouraged its members not to respond to the Representative's pole.[54] Although this bill, and its Senate counterpart, never got out of subcommittee they were the first in a long series of Congressional action.[55]

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[51] Id. at p. 699.

[52] Id. at p. 699-700.

[53] "Children's Television Education Act of 1983," Congressional Record E4793 (1983).

[54] "Wirth's Way: Hour a Day for the Children," Broadcasting 36 (October 10, 1983).

[55] Jacqueline Calmes, "Kids' TV Advocates Lobby Congress for Help . . . But Broadcasters Say Programs are Adequate," Congressional Quarterly Weekly Report 3 (January 19, 1985).

In spite of the growing Congressional concern the FCC specified, in its 1984 Report and Order, that, while broadcasters still had an obligation to serve children, quantifiable rules were unjustified due to the variety of video sources, first amendment concerns and regulatory difficulties of inflexible standards.[56] In other words, there was nothing "special" that broadcasters had to do in order to serve the special needs of children.[57] As could be assumed the industry was in favor of removing regulations, while non-industry sources wanted to return to the strict proposals outlined by ACT in 1974. These organizations saw regulation as necessary due to industry "backsliding" and the abolition of the NAB Code.[58] Without the NAB Code reliance on self-regulation was an extremely weak regulatory argument.[59]

The FCC, however, in a 3-1 decision, favored deregulation and therefore, did not adopt any programming guidelines. "But, there is a continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs."[60] When determining those needs, however, the broadcaster can take into account other services available in its marketplace.[61] It is interesting to note that no station has ever lost its license due to children's programming violations.[62]

These change was not met favorably. As Commissioner Henry M. Rivera, in his dissenting statement, said, ". . . broadcasters may take local marketplace

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[56]"Children's Television Programming and Advertising Practices: Report and Order," 49(9) Federal Register 1704 (1984).

[57]"Children's Television Programming and Advertising Practices: Report and Order," 96 F.C.C. 2d. 634, 661 (1984).

[58]Id. at p. 1706.

[59]Id. at p. 662.

[60]Id. at p. 1712.

[61]Id.

[62]Calmes, p. 4.

conditions into account in determining how (or whether) to meet their 'duty' to children, a freedom not now enjoyed by licensees for television audiences as a whole. Thus my colleagues have, in effect, 'deregulated' television--but only as far as children are concerned."[63] Rivera dissented for three reasons: the FCC changed its existing policy without providing thorough explanation or justification; there is not sufficient evidence that there is enough programming for children, in fact there is evidence the programs are in short supply; and the FCC's legal and policy concerns do not have foundation.[64] These are similar to the objections raised by the ACT in their lawsuit, heard before the D.C. Court of Appeals on January 18, 1985.

The ban on program length commercials was not officially removed until June 27, 1984 in a Report and Order that did not deal directly with children's program length commercials, but all such advertisements in general.[65] The ban was removed in order to allow broadcasters to present and experiment with innovative commercials and prevent any chilling effect on program content, in light of advertisement's First Amendment protection.[66] In addition, the FCC argued that their previous policies were not the least restrictive means of achieving the goal as described under United States v. O'Brien.[67] The commission concluded that, "it seems clear to us that if stations exceed the tolerance level of viewers by adding "too many' commercials the market will regulate itself, i.e., the viewers will not watch and the advertisers will not buy time."[68] The question remains, however, if the market can or will

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[63] Id. at p. 661.

[64] Id. at p. 658-659.

[65] "In the Matter of the REvision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations," 98 F.C.C. 2d. 1076, 1102 (1984).

[66] Id. at p. 1104.

[67] Id.

[68] Id. at p. 1105.

regulate programs that are highly rated and generate profit, but amount to a thirty minute commercial for a toy manufacture's products.

Deregulation coincided with an increase in the number of program length commercials on children's television. As NAB Vice President for Public Affairs Shaun Sheehan explains, "The FCC got out of the regulatory business entirely. You can run as many commercials as you want. You can run a 30-minute commercial if you want to."[69] ACT President Peggy Charren expressed concern to the FCC in October 1983 that these programs, in addition to their economic harm, were displacing more appropriate shows.[70] Sheehan does not consider programs such as He-Man and the Masters of the Universe to be program length advertisements, especially since Sesame Street and Mickey Mouse are licensed just as heavily.[71]

The difference between licensing Sesame Street and the new wave of program length commercials is that the new shows were designed as part of a coordinated package to sell both program and toy. In the past the trend was to create the program and if it, and its characters, was successful licensing agreements for product lines would be arranged. For most of the new programs this coordination is done with the help of the program producer, often well established players such as Hanna-Barbera, and the toy manufacturer. As Dale Kunkel explains, "Each program's themes, characters, and settings are carefully crafted persuasive messages in the same way that television commercials are carefully crafted persuasive messages.[72] For the manufacturer this arrangement results in much higher profits than just advertising a toy during a 30 second commercial.[73]

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[69]In Calmes, p. 4.

[70]Calmes, p. 4.

[71]Calmes, p. 4.

[72]Kunkel, "Children's Product-Related Programming," p. 103.

[73]John Wile, Lois Therrien and Amy Dunking, "Are the Programs Your Kids Watch Simply Commercials?" Business Week 53 (march 25, 1985).

The potential for monetary gain is evident in the increase in the number of program length commercials that were developed in the early 1980s. The first was Mattel's He-Man and the Masters of the Universe, which debuted, in syndication, in September 1983, although the dolls were created in 1981.[74] Mattel drew over $500 million from the toys alone in 1984. and it was the most popular children's program.[75] From 1983 to 1988 the number of product-base programs increased from 14[76] to over 70.[77] Of these, Hasbro Bradley Inc.'s The Transformers helped to make its products the most successful toy introduction ever; it drew $100 million its first year.[78] As a Hasbro ad indicates, "Great toys make great licenses!"[79] Commissioner Rivera, a minority of one at the FCC, worried that this trend signified that the majority of children's programming would be funded by toy manufacturers.[80]

Equally frightening to Rivera, ACT and NABB was the new method for enticing independent television stations to carry a toy manufacture's show. In 1985 Telepictures Corp. began production of the animated series Thundercats. Any station that was willing to sign on early to carry the program was given an option to participate in profits from both the show and all the licensed products associated with the program.[81] Telepictures justified this new method of financing, a pre-sold concept, as the only way to produce a high quality show not done by the networks: it costs over $15

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[74]Tom Engelhardt, "Saturday Morning Fever," Mother Jones 39, 41 (September 1986).

[75]Wilke, Therrien and Dunking, p. 53.

[76]Id.

[77]"Battlelines Drawn on Children's Rulemaking," 120 Broadcasting 22 (February 4, 1991).

[78]Id.

[79]"Which Came First, Mickey or the Watch?" 50 Consumer Reports 703 (November 1985).

[80]Id.

[81]Wilke, Therrien and Dunking, p. 53.

million for 65 half-hours.[82] The response among broadcasters was very favorable, since the show premiered in over 90% of the country.[83] Opponents worry that this arrangement will mean that stations will alter their programming decisions based on retail sales ability.[84]

The networks were originally not willing to take on the risk of airing any program length commercials. They turned down Masters of the Universe, but by 1985 all three networks were airing shows based on toys.[85] CBS Vice-President George F. Schweitzer does not see why these programs are wrong so long as the show is evaluated on its entertainment potential.[86] CBS was in development with Walt Disney Productions for a line of toys based on their program The Gummy Bears that was to air in the Fall of 1985.[87]

ACT argued that profit-sharing ran counter to the FCC's market place approach to programming, but the Commission saw it as an innovative means of financing high quality shows, because the market will set the show's price no matter what financing arrangement is used.[88] ". . . the fact that viewers will not watch and advertisers will not buy time if too many commercials are presented--adequately protects the public interest. . ."[89] Even Representative Wirth, who feels these programs are scandalous, did not believe it was up to Congress to tell broadcasters what they could and could not

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[82]"Petition for Rule Making to Prohibit Profit-Sharing Arrangements in the Broadcasting of Children's Programming," 100 F.C.C. 2d. 709, 711 (1985).

[83]Id. at p. 54.

[84]Id.

[85]Id. at p. 54.

[86]Id.

[87]"A TV License to Steal, From Kids," Advertising Age 18 (April 8, 1985).

[88]"Petition for Rule Making to Prohibit Profit-Sharing," p. 713.

[89]"Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations," 104 F.C.C. 2d. 358, 370 (1986).

program, "You can't legislate good judgement."[90] But Charren asks, "Where can a storyline go if you can only have characters and only have situations which the toy company's marketing department approves?"[91] A true concern since G.I Joe must feature every object in the toy line in the scripts each season.[92]

During the proliferation of program length commercials on both the networks and independent television stations, ACT was mounting new protests with the FCC. The response to this action was crucial in terms of establishing what the FCC would consider to be a program length commercial, for until this time the label was being applied to the programs only by critics. ACT alleged that the programs not only depicted throughout the toys that they were based on, but also that the same voices were used in both the show and the advertisements, and that the toy manufacturers were exerting editorial control over the shows.[93] ACT claimed that the blurring of the distinction between commercial and program, since the program is actually an advertisement, violates a broadcaster's public trustee responsibility.[94] Each of the stations that were respondents in the complaint argue that their policies of not having any commercials for the products within or adjacent to the program precluded any blurring in the child's mind.[95]

The Commission concluded that the interweaving of program and commercial was not so great as to make the programs commercials. While the FCC and the stations involved recognized the economic reliance of the show on product

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[90] In Wilke, Therrien and Dunkin, p. 54.

[91] Margaret B. Carlson, "Children's Television has Become no More than a Product Wasteland," 11 American Film 57 (January-February 1986).

[92] Id. at p. 58.

[93] "Action for Children's Television: Memorandum Opinion and Order," 58 RR 2d. 61, 62 (1985).

[94] Id. at p. 63.

[95] Id.

success, this was not controlling the controlling interest.[96] In addressing such shows as Sesame Street and Peanuts the FCC concluded, "We se no sensible or administratively practical method of making distinctions among programs based on the subjective intentions of the program producers or on the product licensing/program production sequence," especially since no harm to children was demonstrated by exposure.[97] Without compelling harm the child's First Amendment right to information is paramount.[98] More importantly the FCC stated the their 1969 Hot Wheels decision was being read too broadly and did not indicated that licensing and off-program advertising were deceptive or contrary to public interest.[99] The economic interest of stations and advertisers won once again.

The legislative tides began to turn in favor of opponents of deregulation in 1987 with the decision in Action for Children's Television, et al., v. Federal Communications Commission.[100] In clarifying its 1984 deregulation decision to the NAB, the FCC indicated in a few sentences that deregulation applied to children's programming, which, according to the Court, does not constitute a reasoned analysis.[101] The Court indicated that over the past 15 years the FCC had argued that market forces were inadequate in the area of children's television and the Commission supplied no justification in 1984 as to why this situation had changed.[102] In addition, the Court charged that since the FCC never eliminated all commercials they could not use station revenue as a basis for deregulation, which now might result in excessive

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[96] Id. at p. 67.

[97] Id. at p. 67.

[98] "Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children," p. 571.

[99] Id. in note 18.

[100] 821 F.2d 741 (D.C. Cir. 1987).

[101] Id. at p. 745.

[102] Id. at p. 746.

commercialization.[103] Therefore, the Court concluded that, "the Commission has failed to explain adequately the elimination of its long-standing children's television commercialization guidelines, and we therefore remand to the Commission for elaboration on that issue."[104] In September, the same Court sided with the National Association for Better Broadcasting that toy manufacturers should be identified when they sponsor a program, as pursuant to Section 317 of the Communications ACT.[105]

In addition to the Court action, a new development in interactive television brought the idea of program length commercials back to the attention of Congress. Mattel's Captain Power and the Soldiers of Fortune, which debuted September 19, 1987, allowed viewers, who bought $30 laser guns, to engage in five minutes of battle in each episode.[106] While Mattel argued that the show could be entertaining without the toy, they were being advertised under the same theme.[107]

Based on the findings of the Court and the increasing concern the FCC, in October 1987, began precedings into new regulations for advertising limits and banning program length commercials, action which was not called for by the Court of Appeals.[108] While Commissioners Dennis Patrick, James Quello and Mimi Dawson were responsible for the deregulation, Quello had changed his mind in regards to the special nature of children, however, none of the Commissioners appeared to favor banning program length commercials that they believed

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[103] Id.

[104] Id. at p. 750.

[105] "That's All Folks," 307 The Economist 31 (June 18, 1988).

[106] Art Levine, "Look Out, Kids! The TV Shoots Back," U.S. News & World Report 72 (October 5, 1987).

[107] Steven W. Colford, "Rules Mulled for Kiddie TV," Advertising Age 2 (September 21, 1987).

[108] "FCC Takes Second Look at Children's Advertising," 113 Broadcasting 54 (October 26, 1987).

resulted in greater program diversity.[109] Yet, Democratic Representative Edward Markey of Massachusetts, in describing the over 40 program length commercials on television, said, "What was once called a vast wasteland is now more accurately dubbed a vast waste dump."[110] As these precedings were getting underway, however, the market seemed to be responding to the glut of program length commercials by cancelling those that were not successful.[111]

From 1987 to 1989 both the Senate and the House of Representatives engaged in numerous attempts to pass bills dealing with children's programming, advertising limits and program length commercials. After two months of changes and fighting between Markey, the NAB and ACT, the 100th Congress, in overtime, overwhelmingly passed H.R. 3966 that would establish commercial time limits and required broadcasters to serve children's special needs.[112] The measure was also supported by the networks and the Association of Independent Television Stations.[113] President Reagan, however, said in his Memorandum of Disapproval, "The bill simply cannot be reconciled with the freedom of expression secured by our Constitution."[114] In spite of the veto, Congress and the industry were still willing to work on getting another bill passed.[115]

On April 6, 1989 the House Energy and Commerce Subcommittee on Telecommunications adopted H.R. 1677, a bill identical to the one that Reagan

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[109] Id.

[110] Richard Zoglin, "Zapping Back at Children's TV," 130 Time 99 (November 30, 1987).

[111] Id. at p. 100.

[112] "Congress, in overtime, passes TVRO, Children's Ad Bills," Broadcasting 27, (October 24, 1988).

[113] Id. at p. 28.

[114] In "Reagan Kills Children's TV Bill," 115 Broadcasting 68 (November 14, 1988).

[115] "Industry, Hill Stunned by Veto," 115 Broadcasting 68, 69 (November 14, 1988).

pocket vetoed less than a year earlier.[116] Senate bill S 707 was sponsored by Howard Metzenbaum (D-Ohio). Now, however, George Bush was in office and he was elected as "the Education President," which renewed hope that he would not veto this new measure. Wirth still believed that the bill proposed by Subcommittee Chairman Markey was not strong enough,[117] but Markey felt it was the best way to stop the increasing amount of commercialization that resulted from deregulation.[118]

The NAB continued to support the bill in hopes that their support in this area would translate into Congressional support in other areas of industry concern, such as "must carry" cable legislation.[119] NAB approval came after trying to kill the legislation in Senate Committee by having it apply to cablecasters as well. This approach backfired since cable companies supported the measure.[120] NAB's willingness to concede certain provisions meet with editorial condemnation, "We believe the First Amendment is so valuable that broadcasters who bargain it away are bound to come out on the short end of the deal. . ."[121]

Although Markey's bill was not as strong as Wirth's, ACT was willing to support it, because they felt it could be politically conceivable.[122] NAB President Eddie Fritts said, "Because of our past differences, it is significant, indeed unprecedented, for NAB and ACT to join together on a

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[116]Paul Starobin, "Children's TV Bill Is Marked Up," Congressional Quarterly Weekly Report 751 (April 8, 1989).

[117]Id. at p. 752.

[118]"Children's TV Legislation on the Move," Broadcasting 32, 33 (April 10, 1989).

[119]Alyson Pytte, "Congress Ready Once Again to Curb Children's TV," Congressional Quarterly Weekly Report 1764 (July 15, 1989).

[120]"Cable Gets Hill Praise for Children's Programming," 117 Broadcasting 88 (October 23, 1989).

[121]"Restraining the Genie," 120 Broadcasting 98 (February 11, 1991).

[122]Id.

children's television bill."[123] Markey's bill had no program length commercials provision, but Wirth's defined them as advertisements, which would be banned for violating the time restrictions. Markey's proposal, and the one that was included in the final bill, called for 10.5 minutes of ads per hour on weekends and 12 minutes on weekdays.[124]

While the NAB was pushing for the House version of the bill, the House was forced to let the Senate make the first move. There Wirth and Senator Daniel Inouye (D-Hawaii) worked on strengthening the measure.[125] This compromise bill, S 1992, would keep the advertising limits as specified previously and require serving the educational and informational needs of children with a broadcaster's overall programming[126], but leave the defining of program length commercials to the FCC.[127] The NAB managed to make the program requirements less specific.[128] This bill passed both the Senate and the House in July, and a final version, with the compromise on the endowment provision, passed both houses of Congress on October 1. James May, executive vice-president of government relations for NAB, argued, "The bill protects children from overcommercialization in their TV and cable programs, while acknowledging that advertising is what makes these programs possible."[129]

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[123]"Children's TV Bill Set for Vote," Broadcasting 57, 58 (October 2, 1989).

[124]"FCC Comments Call for Constitutional Challenge to Children's Act," 120 Broadcasting 48 (January 28, 1991).

[125]"A Case History of How Not to," 117 Broadcasting 82 (October 30, 1989).

[126]"Senate Kidvid Bill Limits Ads," 119 Broadcasting 32 (July 16, 1990).

[127]Fred M. Hechinger, "Children! Do you Think TV has (Thundercats) too many (Gummi Bears) commercials?" The New York Times B9 (February 28, 1990).

[128]"House Votes to Restrict Ads in Children's Shows," 119 Broadcasting 74 (July 30, 1990).

[129]Mary Lu Carnevale, "House Clears Bill Requiring Broadcasters to Provide Children's TV Programming," The Wall Street Journal B4 (July 24, 1990).

The Justice Department recommended a veto due to First Amendment considerations.[130] The Supreme Court, however, in deciding an affirmative action case on June 27, 1990, supported the government's right, due to spectrum scarcity, to regulate broadcasting in the public welfare, which increased the bill's chances of not being vetoed.[131]

The Children's Television Act of 1990 became law, without Bush's signature, on October 17, 1990. The Act begins, "To require the Federal Communications Commission to reinstate restrictions on advertising during children's television, to enforce the obligation of broadcasters to meet the educational and informational needs of the child audience, and for other purposes."[132] One of those other purposes, as describe in Section 104, was to direct the FCC to complete, within 180 days, the proceeding "Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations."[133] In this reassessment of program length commercials the FCC was to take into account Congress' findings that while advertiser revenue assists in producing children's programs, special safeguards are required to prevent overcommercialization.[134] This was the extent of Congress' action in the area of program length commercials.

The Act's provisions were expected to have little effect on broadcasters, the majority of whom were already complying with the commercial limitations.[135] Although Bush chose not to sign the bill, it becomes law

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[130]"House Passes Limits on Kids' TV," Congressional Quarterly Weekly Report 2407 (July 28, 1990).

[131]Mike Mills, "Congress Ready to Limit Ads on Children's TV Programs," Congressional Quarterly Weekly Report 3011 (September 22, 1990).

[132]104 STAT. 996 Public Law 101-437 (October 17, 1990).

[133]MM Docket No. 83-670.

[134]Children's Television Act of 1990.

[135]"TV's 'Premature' Strategy for Children's TV," 119 Broadcasting 70 (October 15, 1990).

within 10 days of his receiving it, he made clear his disapproval of the measure on counterproductive and constitutional grounds. The NAB and ACT were pleased with the compromise. According to Charren, "Congress has sent a powerful message to each TV station: Make kids count or you'll be counted out."[136]

While ACT and other lobbyists hoped that the FCC would decide on a definition that would eliminate shows such as Super Mario Brothers Super Show and Teenage Mutant Ninja Turtles, programs that were either preceded by the toys by less than years[137] or made in conjunction with the toy[138], the Commission sent an early signal that they did not consider such programs to be program length commercials.[139] In November the FCC began to consider a definition that significantly benefited broadcasters and advertisers, who had been arguing for strict definitions of all of the Act's concepts.[140]

Instead of ruling that toy based programs violated the maximum commercial hour limits, the FCC believed that a violation would only occur if advertisements for the toys were included within the program, a practice which is considered rare by everyone involved[141] and which most broadcasters have found to be ineffective.[142] The trade-off of this proposed definition was that it would allow shows such as Sesame Street and The Jetsons to continue even

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[136]"President's Pocket Unveto Allows Children's Bill to Become Law," 119 Broadcasting 35 (October 22, 1990).

[137]Paul Harris, "Org Calls for ACT-ion on Kidvid Bill Enforcement," Variety 39 (February 4, 1991).

[138]"Battlelines Drawn on Children's Rulemaking," p. 22.

[139]Edmund L. Andrews, "Toy-Based TV Shows Win Ruling," The New York Times D1 (November 9, 1990).

[140]"Battlelines Drawn on Children's Rulemaking," p. 22.

[141]Id.

[142]"FCC Sets Children's Ad Limits," 119 Broadcasting 33, 34 (November 12, 1990).

though they have successful licensing agreements.[143] What is interesting is that the FCC was still using the same wording for the definition of a program length commercial with just a new interpretation.[144]

The FCC's definition was adopted, in a 5-0 decision, on April 9, 1991, although it would not apply to non-commercial stations.[145] While broadcasters and advertisers were pleased with the strict interpretations of The Children's Television Act of 1990, ACT and other lobbyists threatened to take the measure to court,[146] especially since the ruling would allow similar animation to be used on both the program and its advertisements, further muddying the distinction between the two for children.[147] The policies were to take effect in October of 1991, which meant that stations up for license renewal on June 1, 1992 would be the first to come under the Act's scrutiny.[148] The FCC, however, was empowered to review the advertising restrictions after January 1, 1993 and if a notice and public hearing indicated the restrictions could be altered.[149]

The FCC's actions did not please Inouye or Wirth who, as expressed in letters to the FCC, felt that the Commission's approach failed to protect children from advertising disguised as programs.[150] The FCC responded that not

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[143] Id. at p. D18.

[144] Id.

[145] Paul Farhi, "FCC Issues Tighter Rules on Kids' TV," The Washington Post C1 (April 10, 1991).

[146] Id. at p. C4.

[147] Mary Lu Carnevale, "FCC Adopts Rules on Children's TV; Critic Calls Them 'Barest Minimum,'" The Wall Street Journal B6 (April 10, 1991).

[148] "FCC Endorses Children's TV Act," Broadcasting 90 (April 15, 1991).

[149] Michael J. Palumbo, "Broadcast Regulation, Has the Marketplace Failed the Children: The children's Television ACt of 1990," 15(345) Seton Hall Legislative Journal 345, 348 (1991).

[150] Edmund L. Andrews, "FCC Adopts Limits on TV Ads Aimed at Children," The New York Times D7 (April 10, 1991).

only was the new definition narrowly tailored and easy to understand, but it also prevented advertising products within the body of the show, without the proper separation. The Commission also indicated, however, that ads for the products could be run immediately before or after the program[151], with only a 60 second delay.[152]

Although Congress was displeased there was not expected to be any major outcry[153], except from ACT who filed a Petition to Reconsider with the FCC. ACT urged the FCC to return to its broader Hot Wheels definition of program length commercials, which indicated to ACT that the Commission had been able to make distinctions between toy-based programs and programs with legitimate spin-offs for 13 years.[154] ACT said the current definition fails "to address public interest issues, and action 'is thus arbitrary and unlawful.'"[155]

Due to this increased pressure, the FCC postponed enforcement of the Act's provisions, except for the three networks, from October to January, thus allowing no commercials limits in the pre-Christmas period.[156] Since shows during this time usually contain up to 90 seconds of additional commercials, independent stations could have lost up to $83.8 million.[157] According to Charren, "They've stolen TV time from kids, and given to the greedy grinches who control broadcasting."[158] Also, the FCC tightened its separation restriction from 60 seconds to separating program and ad with "intervening and

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[151] Id.

[152] "ACT Challenges Children's TV Rules," Broadcasting 62 (May 20, 1991).

[153] "ACT Challenges Children's TV Rules," Broadcasting 62 (May 20, 1991).

[154] Id.

[155] Id.

[156] Paul Farhi, "FCC Delays Imposing Ad Limits on Children's TV," The Washington Post D1 (August 2, 1991).

[157] Id. at p. D3.

[158] Id.

unrelated program material."[159]

What is apparent from the FCC's new definition of program length commercials is that it does no more than redefinition host-selling. Host-selling is the process of having a character from a program sell products within the program itself. The products can either be ones from the show or anything else. As noted earlier this practice is not frequent, and in fact, was one of two practices that were not deregulated in 1984. The other was the separation requirements between program and advertisement.[160] The Children's Television Act of 1990, as enforced by the FCC, will simply serve as a reminder that these techniques are illegal. It will also stop the few violations that occurred in the early 1990s, such as Video Power, which interspersed video game commercials with the program without proper separation.[161] The Act raises a number of questions not the least of which is why are non-commercial stations exempt, and, more specifically, why has their been such protection given to Sesame Street? It appears that everyone involved in the issue of program length commercials feels that using programs as advertisements to children is alright as long as the show is educational.

What the Act does not halt is the trend of programs that are based on previously existing toys or products. In fact, the trend seems to be branching beyond just toy manufacturers. Characters from snack-food products are beginning to emerge as their own entertainment programs. For example, Chester Cheetah will have a show on FOX, although ACT is petitioning the FCC to prevent its airing,[162] and Kraft is developing a show for its cheese-colored Cheeseasarus Rex. What is more frightening than the programs themselves is the fact that a Ronald McDonald Christmas Special, The Wish that Changed

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[159] Id.

[160] Jonathan Rowe, "Commercials Aimed at Children Spark Debate," Christian Science Monitor 13 (June 18, 1990).

[161] Id.

[162] Stuart Elliott, "Commercial Cartoon Furor Grows," The New York Times C1, C5 (March 5, 1992).

Christmas, was allowed, by both CBS and the FCC, to contain advertisements for McDonald's products.[163] Less than two years after the passage of The Children's Television Act of 1990 the FCC is flagrantly disregarding the definitions that it established, for by their account The Wish that Changed Christmas should have been considered a program length commercial. As Joseph Seldin said, "Manipulation of children's minds in the fields of religion or politics would touch off a parental storm of protest and a rash of Congressional investigations. But in the world of commerce children are fair game and legitimate prey."[164] The debate over program length commercials is sure to continue.

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[163]Joanne Lipman, "Snack Makers Cook Up Stars for Kiddie TV," The Wall Street Journal B1, B4 (January 8, 1992).

[164]In 28 FCC 2d (1971), p. 374.

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